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No. 83-729

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE VERNON HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether interlocutory appellate review is available to a Member of Congress who claims that a federal indictment is insufficient, and that he is a victim of selective prosecution.

2. Whether financial disclosure reports required of Members of Congress by the Ethics in Government Act of 1978 are protected by the Speech or Debate Clause.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is not reported. The opinion of the district court (Pet. App. F1-F22) is reported at 566 F. Supp. 162.

JURISDICTION

The judgment order of the court of appeals was entered on August 1, 1983. A petition for rehearing (Pet. App. C1, D1) was denied on September 26, 1983. The petition for a writ of certiorari was filed on November 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 7, 1983, petitioner, an Idaho Congressman, was charged in a four-count indictment with filing with Congress false financial disclosure statements (required by the Ethics in Government Act of 1978, 2 U.S.C. 701-709), in violation of 18 U.S.C. 1001. The district court denied his motion to dismiss the indictment on speech or debate and other grounds (Pet. App. F1-F22). The court of appeals affirmed the speech or debate ruling and dismissed the appeal insofar as it presented other grounds challenging the validity of the indictment (Pet. App. A1).

1. The indictment charged petitioner with misrepsenting the extent and nature of his financial liabilities during 1981 by excluding loans totaling $135,000 made to him (Count I); misrepresenting the extent and nature of his and his wife's financial liabilities during 1980 by excluding a $61,503.42 loan (Count II); falsely representing that neither he nor his wife had engaged in commodities futures transactions in 1979, when in fact they had purchased 125 silver futures contracts valued at $3,877,800 on January 16, 1979, and sold those contracts on January 18, 1979, for a profit of $87,475 (Count III); and misrepresenting the extent and nature of his and his wife's financial liabilities during 1978 by excluding a $50,000 loan (Count IV).

Following return of the indictment, petitioner made three arguments before the trial court to support his motion to dismiss the indictment: (1) that the Speech or Debate Clause of Article 1, Section 6 of the Constitution protects him from any prosecution concerning reports required by the Ethics in Government Act of 1978 (EIGA); (2) that the financial disclosure requirements of the EIGA are not subject to criminal

sanctions under 18 U.S.C. 1001 because Congress intended that they be enforced only by civil measures; and (3) that he is a victim of selective prosecution.

On June 13, 1983, the district court denied petitioner's motion to dismiss. It ruled that the filing of financial disclosure reports by Members of Congress is not legislative activity protected by the Speech or Debate Clause (Pet. App. F13-F18); that the civil sanctions set forth in the EIGA (2 U.S.C. 706) did not preempt or repeal by implication the criminal sanction of 18 U.S.C. 1001 for false statements in connection with any matter within the jurisdiction of any department or agency of the United States (Pet. App. F2-F12); and that petitioner had not established a prima facie case of selective prosecution (Pet. App. F18-F21). The court commented that since the Speech or Debate Clause issue was immediately appealable, it would be more efficient for the court of appeals to consider the other two issues raised by petitioner at the same time (Pet. App. F21).

2. Petitioner filed an interlocutory appeal, seeking review of all the issues raised in his motion to dismiss. The government moved for summary affirmance on the speech or debate issue and dismissal for lack of appellate jurisdiction on the other two issues. The court of appeals granted this motion (Pet. App. A1). It affirmed the ruling denying the motion to dismiss on speech or debate grounds for the reasons stated in the district court's opinion. It dismissed the appeal from the other rulings on the ground that they were not final decisions under 28 U.S.C. 1291, and did not fit within any exception to the finality requirement.

ARGUMENT

1. Petitioner contends (Pet. 6-16) that his status as a Congressman compelled the court of appeals to review the pretrial rulings that false financial disclosure statements are subject to criminal sanctions and that he is not the victim of selective prosecution. The court of appeals properly refused to consider these contentions on petitioner's interlocutory appeal.

Congress has limited the jurisdiction of the courts of appeals to "final decisions of the district courts." 28 U.S.C. 1291. As recently noted in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), this Court has repeatedly emphasized the special importance of strictly enforcing the final judgment rule in criminal cases. The statute's "insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." *Id.* at 265 (quoting *DiBella* v. *United States*, 369 U.S. 121, 124 (1962)). See also *United States* v. *Bird*, 709 F.2d 388 (5th Cir. 1983).

This Court has construed 28 U.S.C. 1291 to permit exceptions to the need for finality in only a limited category of cases falling within the "collateral order" rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). "Such orders 'must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' " *Hollywood Motor Car*, 458 U.S. at 265 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

In criminal cases, this Court has found such collateral orders on only three occasions. First, *Stack* v. *Boyle*, 342 U.S. 1 (1951), held that an order deny-

ing a motion to reduce bail pending trial was immediately appealable. Not only is the issue of bail entirely separate from the merits, but meaningful review of what is charged to be a deprivation of a specifically protected Eighth Amendment right cannot be had after sentence, since the issue necessarily becomes moot with the commencement of trial.

Abney v. *United States*, 431 U.S. 651 (1977), like *Stack* v. *Boyle*, was a case where the lack of immediate review could have resulted in the irremediable deprivation of a specific constitutional right. *Abney* allowed a defendant to take an interlocutory appeal from an order denying a motion to dismiss an indictment on double jeopardy grounds, relying upon the principle that the Double Jeopardy Clause prohibits not only multiple convictions, but also multiple trials for the same offense—an injury that could not be remedied on post-conviction review. 431 U.S. at 660-661. Moreover, "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial" (*id.* at 659).

Helstoski v. *Meanor*, 442 U.S. 500 (1979), the third case, fits precisely the mold defined in *Stack* and *Abney*. The Court there held that a Member of Congress could take an interlocutory appeal in order to assert his Speech or Debate Clause privilege. 442 U.S. at 506-508. Such a claim is collateral in the sense that the defendant makes no challenge to the merits of the charge against him (*id.* at 507). And because the Clause is intended to prevent questioning of Members about legislative acts—not just conviction based on those acts—immediate appeal must be available to guard against the very evil the Clause addresses.

Unlike these three discrete exceptions to the doctrine of finality, the district court's rejection of petitioner's non-speech or debate claims was clearly not a collateral order. Cf. *United States* v. *MacDonald*, 435 U.S. 850 (1978). Petitioner's claim that 18 U.S.C. 1001 does not apply to his financial disclosure statements, like the pendent claim of sufficiency of the indictment in *Abney* v. *United States*, 431 U.S. at 663,

> is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial. Secondly, the issue * * * is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results.

And petitioner's claim of selective prosecution, like the claim of prosecutorial vindictiveness in *Hollywood Motor Car*, "fails the [requirement] for *Cohen* appeals * * * that the claim 'be effectively unreviewable on appeal from a final judgment.'" 458 U.S. at 267. Moreover, in contrast to the claims in *Stack*, *Abney*, and *Helstoski*, the non-speech-or-debate issues that petitioner seeks to have immediately reviewed are not grounded in any specific constitutional guarantee whose very purpose would be frustrated by the failure to relax the jurisdictional requirement of 28 U.S.C. 1291.

Petitioner advances a number of policy reasons why he should be treated differently from other defendants who might raise identical statutory or selective prosecution claims. He argues, for example, that he should be permitted greater opportunities to avoid trial via preliminary "motions and appeals" so that he may be "free to continue his work in Congress relatively unimpaired" (Pet. 11). He adds that un-

less interlocutory appeal is permitted, he will suffer "tremendous time demands and financial[,] * * * psychological and physical drain"—problems compounded by "the extensive press coverage that follows when the defendant is a political figure" (*ibid.*). Avoidance of such entanglements is important, he notes, not only in his own interest but because the effective representation of his constituents demands it.

These concerns are properly addressed to Congress, which is of course free to amend Section 1291 if it concludes that the special status of legislators calls for an exception to the normal requirement of finality. We note, however, that it is by no means clear that the concerns raised by petitioner would not be better served by a district court rule requiring such trials to take precedence over other pending matters than by a rule permitting proliferation of "motions and appeals." It may be doubted whether increased pretrial appellate litigation in this and similar cases will actually reduce the financial, psychological, and physical drains on defendants, or permit indicted Members to serve their constituents more effectively. To the contrary, it seems more likely that speedy resolution of such charges better serves the public interest than the opening of new avenues for protracted delay of trials.

There is in any event simply no warrant, either in the jurisdictional language of 28 U.S.C. 1291 or in this Court's prior decisions, for permitting the right of appeal to turn not on the nature of the issue but on the identity of the defendant. Section 1291 gives the courts of appeals jurisdiction over "final decisions of the district courts," language that *Cohen* and its progeny have interpreted to mean orders that resolve

a collateral "*issue*" and are "effectively unreviewable on appeal from a final judgment." *Hollywood Motor Car*, 458 U.S. at 265 (emphasis added).

Petitioner nevertheless relies on *United States* v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980), for the proposition that non-speech-or-debate issues may be reviewed by a court of appeals once it has already accepted appellate jurisdiction over a speech or debate claim.[1] It is true that portions of the Second Circuit's opinion in *Myers* are difficult to reconcile with the dismissal by the court below of petitioner's appeal on the statutory and selective prosecution issues. But the Second Circuit in *Myers* specifically stated that "[w]e need not determine the full extent of pre-trial appellate jurisdiction in * * * cases" involving Members of Congress. 635 F.2d at 936. The court noted that "[t]he claims of Congressman Myers are, with one exception, all grounded on either the Speech or Debate Clause or the doctrine of separation of powers" (*ibid.*). The one exception was a claim that the indictment failed to state an offense under 18 U.S.C. 201 because of the government's role in the Abscam scheme—a claim that was both combined with and "illuminated by" Myers' Speech or Debate Clause argument. 635 F.2d at 937, 938.

It may thus be that the Second Circuit's opinion in *Myers* stands only for the proposition that "pendent appellate jurisdiction" (*id.* at 936), much like the doctrine of pendent jurisdiction over state claims in federal district courts, may be exercised as a matter

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[1] We note that the policy concerns advanced by petitioner to support liberalized interlocutory review for Members of Congress would appear to apply with equal force whether or not the claims are pendent to a speech or debate claim.

"of discretion, not of plaintiff's right[, where] * * * considerations of judicial economy, convenience and fairness to litigants" warrant. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Such a conclusion is not inconsistent with the court of appeals' refusal to take jurisdiction here over petitioner's nonconstitutional claims, which it could justifiably have concluded were too unrelated to the speech or debate issue to warrant combined consideration. Although we do not endorse the correctness of the theory that may explain the Second Circuit's action, particularly in light of the difficulties noted in *Abney* v. *United States*, 431 U.S. at 663, we nevertheless suggest that its application there does not conflict with this case in a manner warranting this Court's review. This is especially true given the infrequency with which the issue will arise.

We note, moreover, that the decision in *Myers* was rendered before this Court's most recent exploration of 28 U.S.C. 1291 in the context of a criminal case. See *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 270. If the Second Circuit has occasion to revisit the question, it presumably will be obliged to rethink its conclusions in light of this Court's emphasis that "only a narrow group of claims [can] meet the test" embodied in Section 1291.[2]

2. Petitioner also contends (Pet. 16-21) that the filing by members of Congress of financial disclosure reports under the EIGA is "legislative activity" pro-

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[2] Petitioner also relies on *United States* v. *Hastings*, 681 F.2d 706, 708 (11th Cir. 1982), cert. denied, No. 82-863 (Feb. 22, 1983), where the court reviewed a federal judge's claim of immunity from prosecution until after impeachment and conviction by Congress. Such a challenge, however, unlike petitioner's claims, asserts a right that would be destroyed if it were not vindicated before trial.

tected by the Speech or Debate Clause. This claim was properly rejected by the court of appeals.

The Speech or Debate Clause "was designed to preclude prosecution of Members [of Congress] for legislative acts." *United States* v. *Helstoski*, 442 U.S. 477, 488 (1979). To effectuate the purpose of the privilege, the Clause shelters not only actual speeches and debates, but also any "act generally done in Congress in relation to the business before it." Thus, "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States* v. *Brewster*, 408 U.S. 501, 512, 525 (1972). For example, the Clause bars inquiry into the votes of Members of Congress, *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881); *Powell* v. *McCormack*, 395 U.S. 486 (1969), participation in committee hearings, *Gravel* v. *United States*, 408 U.S. 606 (1972), and investigations or investigatory subpoenas by Congress, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1972).

In *Gravel* v. *United States*, 408 U.S. at 625, this Court explained what it meant by "legislative acts":

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

As the Second Circuit held in *United States* v. *Myers*, 692 F.2d 823, 849 (1982), cert. denied, No. 82-1183

(May 31, 1983), the filing of an EIGA financial disclosure statement plainly does not fit within this definition.

Nor is there, as petitioner urges, a distinction between the evidentiary use of EIGA reports permitted in *Myers*, and the use of such reports as the basis for a false statements prosecution. The Clause is, after all, designed to prevent probing into or otherwise inhibiting members' freedom in the deliberative and communicative processes. And this Court has held that there is no material difference in the impacts on those processes attending use of the reports as evidence at trial to prove a bribery charge, on the one hand, and their use as the basis for a false statements prosecution, on the other. See *United States* v. *Helstoski*, 442 U.S. at 489.

Petitioner argues (Pet. 19), however, that the financial reports are protected by the Speech or Debate Clause because they are "an integral part of the participation by Members in the discharge of Congressional disciplinary authority." But *Gravel* v. *United States*, relied upon by petitioner, does not stand for the proposition that Congress alone can discipline its members, or that the Speech or Debate Clause renders inadmissible evidence of a Congressman's conduct that is somehow related to the congressional disciplinary function. Congress has the authority to discipline members who submit false statements to the House Disbursing Office, *United States* v. *Bramblett*, 348 U.S. 503 (1955); who submit false statements to the House Finance Office, *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); who take money in return for promises of future congressional favor, *United States* v. *Brewster*, 408 U.S. 501 (1972); and who take money in return

for lobbying the Department of Justice, *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). But notwithstanding the congressional authority to discipline, all of these acts were also held to be proper subjects for criminal prosecution.[3] Given the lack of specific standards circumscribing Congress's control over member conduct (see U.S. Const. Art. 1, § 5, Cl. 2), to say that all activity within the orbit of potential congressional discipline is protected against prosecution would be tantamount to an unrestricted grant of immunity to members of Congress.[4]

Petitioner incorrectly draws from *Gravel*, 408 U.S. at 625, the general principle that the Speech or Debate Clause protects against inquiry not only into the deliberative and communicative processes, but also into "other matters * * * within the jurisdiction of either House" (Pet. 18). But as *Gravel* makes clear, inquiry into such "other matters" is forbidden only " 'when necessary to prevent indirect impairment of [legislative] deliberations.' " 408 U.S. at 625 (quoting *United States* v. *Doe*, 455 F.2d 753, 760 (1st Cir. 1972)). Congressmen file their financial disclosure statements with the House Clerk each year. The Clerk sends copies of the statements to the House Committee on Standards of Official Conduct for its review. That Committee is empowered to "determine

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[3] "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentially related to the legislative process." *United States* v. *Brewster*, 408 U.S. at 518.

[4] We note that petitioner's position on the Speech or Debate issue would immunize Members from prosecution for the identical acts that *could* be punished if performed by federal judges and many executive officials, who file virtually identical forms pursuant to the EIGA.

whether the reports are filed in a timely manner, are complete, and are in proper form." 2 U.S.C. 705. It is difficult to conceive how a criminal prosecution involving use of the disclosure reports could impair in any way the work of the Standards Committee.[5]

In any event, the Speech or Debate Clause does not distinguish between civil and criminal cases. *Doe* v. *McMillan*, 412 U.S. 306, 311-312 (1973). And by including a civil remedy in the EIGA (2 U.S.C. 706), Congress not only ceded to the executive the right to discipline members, but also anticipated judicial proceedings in which Congressmen would be questioned about their financial disclosure statements. It is thus apparent that Congress did not consider financial disclosure statements to be protected "legislative acts" in a civil context. The same should be no less true here, where only the sanctions—not the acts in question—are different.

In sum, a Congressman's financial disclosure statements simply are not legislative acts, and are not protected by the Speech or Debate Clause. The ruling denying petitioner's motion to dismiss on Speech or Debate Clause grounds was correct.

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[5] In *United States* v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1979), upon which petitioner also relies, the court simply ruled that a Congressman's own testimony before the House Ethics Committee was protected by the Speech or Debate Clause.

CONCLUSION

The petition for a writ of certiortari should be denied.

Respectfully submitted.

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